

<b>ARTICLE XIII</b>	<b>TABLE OF CONTENTS</b> <b>APPEALS, VARIANCES, AND INTERPRETATIONS</b>
---------------------	--

<b>13.01 Appeals .....</b>	<b>1</b>
<b>13.02 Variances .....</b>	<b>2</b>
A. General.....	2
B. Variances from Flood Hazard Overlay District Requirements.....	3
C. Variances from Airport Protection District Overlay Requirements .....	5
<b>13.03 Interpretations .....</b>	<b>6</b>
<b>13.04 Requests to Be Heard Expeditiously .....</b>	<b>6</b>
<b>13.05 Burden Of Proof in Appeals and Variances .....</b>	<b>6</b>
<b>13.06 Evidentiary Hearing Procedures Required On Appeals and Variances .....</b>	<b>6</b>
<b>13.07 Notice of Hearing .....</b>	<b>7</b>
<b>13.08 Board of Adjustment Action on Appeals and Variances .....</b>	<b>7</b>
<b>13.09 Evidence .....</b>	<b>8</b>
<b>13.10 Modification of Application at Hearing .....</b>	<b>8</b>
<b>13.11 Record .....</b>	<b>8</b>
<b>13.12 Written Decision.....</b>	<b>9</b>
<b>13.13 Appeals of Board of Adjustment Decisions to Superior Court.....</b>	<b>9</b>

**13.01 Appeals**

- A. An appeal from any final order or decision of the Zoning Administrator may be taken to the Board of Adjustment by any person aggrieved. The appeal system established in this Ordinance provides for a review of cases in which a decision or interpretation made by the Zoning Administrator is alleged to be erroneous. For example, an appeal may contest the Zoning Administrator's decision regarding whether a particular use is permissible within a particular zoning district or the Zoning Administrator's interpretation of the methodology for calculating maximum permissible sign surface area.
- B. An appeal is taken by filing with the Zoning Administrator and the Board of Adjustment a written notice of appeal specifying the grounds therefore. A notice of appeal shall be considered filed with the Zoning Administrator and the Board of Adjustment when delivered to the Planning and Inspections Department, the required filing fee paid, and the date and time of filing entered on the notice by the planning staff. An appeal must be taken within thirty days after the date of the decision or order appealed from.
- C. Whenever an appeal is filed, the Zoning Administrator shall forthwith transmit to the Board of Adjustment all the papers constituting the record relating to the action appealed from.
- D. An appeal stays all actions by the Zoning Administrator seeking enforcement of or compliance with the order or decision appealed from, unless the Zoning Administrator certifies to the Board of Adjustment that (because of facts stated in the certificate) a stay would, in his opinion, cause imminent peril to life or property. In that case, proceedings shall not be stayed except by order of the Board of Adjustment or a court, issued on application of the party seeking the stay, for due cause shown, after notice to the Zoning Administrator.
- E. The Board of Adjustment may reverse or affirm (wholly or partly) or may modify the order, requirement or decision or determination appealed from and shall make any order, requirement, decision or determination that in its opinion ought to be made in the case before it. To this end, the Board of Adjustment shall have all the powers of the officer from whom the appeal is taken. Board of Adjustment action on appeal requests shall comply with the voting requirements of [Section 13.08 A](#).
- F. Evidentiary hearing procedures for appeal requests are delineated in [Section 13.06](#). Hearing notice requirements are outlined in [Section 13.07](#).
- G. The appeal system established herein applies only to decisions or interpretations made by the Zoning Administrator. This appeal system does not apply to decisions or interpretations made by the Planning Board or the Board of County Commissioners. Additionally, the Board of Adjustment is not authorized to issue advisory decisions regarding appeals. Only the formal decisions or interpretations of the Zoning Administrator may be appealed to the Board of Adjustment.

## 13.02 Variances

### A. General

1. An application for a variance along with the required filing fee shall be submitted to the Board of Adjustment by filing a copy of the application with the Zoning Administrator.
2. A variance may be granted by the Board of Adjustment if it concludes that strict enforcement of this Ordinance would result in practical difficulties or unnecessary hardships for the applicant and that, by granting the variance, the spirit of this Ordinance will be observed, public safety and welfare secured, and substantial justice done. It may reach these conclusions if it finds that:
  - (a) If the applicant complies strictly with the provisions of the Ordinance, he can make no reasonable use of his property;
  - (b) The hardship of which the applicant complains is one suffered by the applicant rather than by neighbors or the general public;
  - (c) The hardship relates to the applicant's land, rather than personal circumstances;
  - (d) The hardship is unique, or nearly so, rather than one shared by many surrounding properties;
  - (e) The hardship is not the result of the applicant's own actions; and
  - (f) The variance will neither result in the extension of a nonconforming situation in violation of [Article XII, Nonconforming Situations](#) nor authorize the initiation of a nonconforming use of land.
3. In granting variances, the Board of Adjustment may impose such reasonable conditions as will ensure that the use of the property to which the variance applies will be as compatible as practicable with the surrounding properties. Appropriate conditions, which must be reasonably related to the condition or circumstance that gives rise to the need for a variance, may be imposed on any approval issued by the Board of Adjustment.
4. A variance may be issued for an indefinite duration or for a specified duration only. Unless otherwise specified, any order or decision of the Board of Adjustment granting a variance shall expire if the applicant does not obtain a building permit or certificate of occupancy for such use within 60 calendar days from the date of the decision or if construction of the use has not commenced within 180 calendar days from the date of the issuance of a building permit.
5. The nature of the variance and any conditions attached to it shall be entered on the face of the zoning permit, or the zoning permit may simply note the issuance of the variance and refer to the written record of the variance for

further information. All such conditions are enforceable in the same manner as any other applicable requirement of this Ordinance.

6. No change in permitted uses may be authorized by variance.
7. Evidentiary hearing procedures for variance requests are delineated in [Section 13.06](#). Hearing notice requirements are outlined in [Section 13.07](#).

**B. Variances from Flood Hazard Overlay District Requirements**

1. In passing upon an application for a variance from the Flood Hazard Overlay District Requirements ([Section 7.02](#)), the Board of Adjustment, as established by [Section 2.03](#), shall consider all technical evaluations, all relevant factors, all standards specified in other Sections of this Ordinance, and:
  - (a) The danger that materials may be swept onto other lands to the injury of others;
  - (b) The danger of life and property due to flooding or erosion damage;
  - (c) The susceptibility of the proposed facility and its contents to flood damage and the effect of such damage on the individual owner;
  - (d) The importance of the services provided by the proposed facility to the community;
  - (e) The necessity of the facility of a waterfront location, where applicable;
  - (f) The availability of alternative locations on the subject property, not subject to flooding or erosion damage, for the proposed use;
  - (g) The compatibility of the proposed use with existing and anticipated development;
  - (h) The relationship of the proposed use to the land development plan and floodplain management program for that area;
  - (i) The safety of access to the property in times of flood for ordinary and emergency vehicles;
  - (j) The expected heights, velocity, duration, rate of rise and sediment transport of the flood waters and the effects of wave action, if applicable, expected at the site; and
  - (k) The costs of providing governmental services during and after flood conditions including maintenance and repair of public utilities and facilities such as sewer, gas, electrical, and water systems, and roads and bridges.

Upon consideration of the factors listed above and the purposes of this Ordinance, the Board of Adjustment may attach such conditions to the granting

of variances as it deems necessary to further the purposes of this Ordinance. Variances are subject to review by the Federal Emergency Management Agency.

2. Variances shall not be issued within any designated floodway or non-encroachment area if any increase in flood levels during the base flood discharge would result.
3. Conditions for variances:
  - (a) Variances may not be issued when the variance will make the structure in violation of other Federal, State, or local laws, regulations, or ordinances.
  - (b) Variances shall only be issued upon a determination that the variance is the minimum necessary, considering the flood hazard, to afford relief.
  - (c) Variances shall only be issued upon (i) a showing of good and sufficient cause; (ii) a determination that failure to grant the variance would result in exceptional hardship; and (iii) a determination that the granting of a variance will not result in increased flood heights, additional threats to public safety, extraordinary public expense, create nuisance, cause fraud on or victimization of the public, or conflict with existing local law or ordinances.
  - (d) Any applicant to whom a variance is granted shall be given written notice specifying the difference between the base flood elevation and the elevation to which the structure is to be built and a written statement that the cost of flood insurance will be commensurate with the increased risk resulting from the reduced lowest floor elevation. Such notification shall be maintained with a record of all variance actions.
  - (e) The Zoning Administrator shall maintain the records of all appeal actions and report any variances to the Federal Emergency Management Agency upon request.
4. Variances may be issued for the repair or rehabilitation of historic structures upon the determination that the proposed repair or rehabilitation will not preclude the structure's continued designation as a historic structure and the variance is the minimum necessary to preserve the historic character and design of the structure. Variances may be issued for the reconstruction, rehabilitation or restoration of structures listed on the National Register of Historic Places or the State Inventory of Historic Places without regard to the procedures set forth in [subsections 1. and 3. above](#).
5. A variance may be issued for solid waste disposal facilities, hazardous waste management facilities, salvage yards, and chemical storage facilities that are located in Special Flood Hazard Areas provided that all of the following conditions are met.

- (a) The use serves a critical need in the community.
- (b) No feasible location exists for the use outside the Special Flood Hazard Area.
- (c) The reference level of any structure is elevated or floodproofed to at least the regulatory flood protection level.
- (d) The use complies with all other applicable federal, state and local laws.
- (e) The Zoning Administrator has notified the Secretary of the North Carolina Department of Crime Control and Public Safety of Chowan County's intention to grant a variance at least thirty days prior to granting the variance.

A zoning permit may be issued for such facilities only if a variance is granted.

- 6. Any applicant to whom a variance is granted shall be given written notice specifying the difference between the Base Flood Elevation (BFE) and the elevation to which the structure is to be built and a written statement that the cost of flood insurance will be commensurate with the increased risk resulting from the reduced reference level elevation. Such notification shall be maintained with a record of all variance actions.

### **C. Variances from Airport Protection District Overlay Requirements**

- 1. Any person desiring to erect or increase the height of any structure, or permit the growth of any tree, or use property not in compliance with the regulations prescribed in [Section 7.01](#) may apply to the Board of Adjustment for a variance in accordance with the provisions of [Section 13.02 A](#). The application for variance shall be accompanied by a determination from the Federal Aviation Administration as to the effect of the proposal on the operation of air navigation facilities and the safe, efficient use of navigable airspace. Such variances shall be allowed where it is duly found that a literal application or enforcement of the regulations will result in unnecessary hardship and relief, if granted, will not be contrary to the public interest, will not create a hazard to air navigation, will do substantial justice and will be in accordance with the spirit of this Section. Additionally, no application for a variance to the requirements of [Section 7.01](#) may be considered by the Board of Adjustment unless a copy of this application has been furnished to the manager of the Edenton Municipal Airport for advice as to the aeronautical effects of the variance. If the Airport Manager does not respond to the application within thirty days after receipt, the Board of Adjustment may act on its own to grant or deny said application.
- 2. Any variance granted, if such action is deemed advisable to effectuate the purpose of [Section 7.01](#) and be reasonable in the circumstances, may be so conditioned as to require the owner of the structure or tree in question to install, operate or maintain, at the owner's expense, such markings and lights as may be necessary. If deemed proper by the Board of Adjustment, this condition may be modified to require the owner to permit the Edenton

Municipal Airport Authority, at its own expense, to install, operate and maintain the necessary markings and lights.

### **13.03 Interpretations**

- A. The Board of Adjustment is authorized to interpret the zoning map and to pass upon disputed questions of lot lines or district boundary lines and similar questions. If such questions arise in the context of an appeal from a decision of the Zoning Administrator, they shall be handled as provided in [Section 13.01](#).
- B. An application for a map interpretation shall be submitted to the Board of Adjustment by filing a copy of the application with the Zoning Administrator. The application shall contain sufficient information to enable the Board of Adjustment to make the necessary interpretation.
- C. Interpretations of the location of floodway and floodplain boundary lines may be made by the Zoning Administrator as provided in [Section 7.02, H](#).

### **13.04 Requests to Be Heard Expeditiously**

The Board of Adjustment shall hear and decide all appeals, variance requests, and requests for interpretations as expeditiously as possible, consistent with the need to follow regularly established agenda procedures, provide notice in accordance with [Section 13.07](#) and obtain the necessary information to make sound decisions.

### **13.05 Burden Of Proof in Appeals and Variances**

- A. When an appeal is taken to the Board of Adjustment in accordance with [Section 13.01](#), the Zoning Administrator shall have the initial burden of presenting to the Board of Adjustment sufficient evidence and argument to justify the order or decision appealed from. The burden of presenting evidence and argument to the contrary then shifts to the appellant, who shall also have the burden of persuasion.
- B. The burden of presenting evidence sufficient to allow the Board of Adjustment to reach the conclusions set forth in [Section 13.02 A. 2.](#), as well as the burden of persuasion on those issues, remains with the applicant seeking the variance.

### **13.06 Evidentiary Hearing Procedures Required On Appeals and Variances**

- A. Before making a decision on an appeal or an application for a variance, the Board of Adjustment shall hold an evidentiary hearing on the appeal or variance.
- B. Subject to [subsection C.](#), the hearing shall be open to the public and all persons interested in the outcome of the appeal or application shall be given an opportunity to present evidence and arguments and ask questions of persons who testify.
- C. The Board of Adjustment may place reasonable and equitable limitations on the presentation of evidence and arguments and the cross-examination of witnesses so that the matter at issue may be heard and decided without undue delay.

- D. The Board of Adjustment may continue the hearing until a subsequent meeting and may keep the hearing open to take additional information up to the point a final decision is made. No further notice of a continued hearing need be published.

### **13.07 Notice of Hearing**

The Zoning Administrator shall give notice of any hearing required by [Section 13.06](#) as follows:

- A. Notice shall be given to the appellant or applicant and any other person who makes a written request for such notice by mailing to such persons a written notice not later than ten days before the hearing.
- B. Notice shall be given to neighboring property owners by mailing a written notice not later than ten days before the hearing to the owners of all properties abutting the parcel that is the subject of the proposed action. Notice may also be given by prominently posting signs in the vicinity of the property that is the subject of the proposed action.
- C. The notice required by this Section shall state the date, time and place of the hearing, reasonably identify the property that is the subject of the application or appeal, and give a brief description of the action requested or proposed.

### **13.08 Board of Adjustment Action on Appeals and Variances**

- A. With respect to appeals, a motion to reverse, affirm, or modify the order, requirement, decision, or determination appealed from shall include, insofar as practicable, a statement of the specific reasons or findings of fact that support the motion. If a motion to reverse or modify is not made or fails to receive the four-fifths vote necessary for adoption, then the motion is not approved.
- B. Before granting a variance, the Board of Adjustment must take a vote and vote affirmatively (by a 4/5 majority) on the required findings stated in [Section 13.02 A. 2.](#) Insofar as practicable, a motion to make an affirmative finding on each of the requirements set forth in [Section 13.02 A. 2.](#) shall include a statement of the specific reasons or findings of fact supporting such motion.
- C. A motion to deny a variance may be made on the basis that any one or more of the six criteria set forth in [Section 13.02 A. 2.](#) are not satisfied or that the application is incomplete. Insofar as practicable, such a motion shall include a statement of the specific reasons or findings of fact that support it. This motion is adopted as the Board of Adjustment's decision if supported by more than one fifth of the Board's membership.
- D. For the purposes of this Section, vacant positions on the Board and members who are disqualified from voting on a quasi-judicial matter shall not be considered 'members of the board' for calculation of the requisite supermajority if there are no qualified alternates available to take the place of such members.
- E. Pursuant to the requirements of NCGS 153A-345 (e1), a member of the Board of Adjustment or any other body exercising the functions of a Board of Adjustment shall



not participate in or vote on any quasi-judicial matter in a manner that would violate affected persons' constitutional rights to an impartial decision maker. Impermissible conflicts include, but are not limited to, a member having a fixed opinion prior to hearing the matter that is not susceptible to change, undisclosed ex parte communications, a close familial, business, or other associational relationship with an affected person, or a financial interest in the outcome of the matter. If an objection is raised to a member's participation and that member does not recuse himself or herself, the remaining members shall by majority vote rule on the objection.

### **13.09 Evidence**

- A. The provisions of this Section apply to all hearings for which a notice is required by [Section 13.06](#).
- B. All persons who intend to present evidence to the Board of Adjustment, rather than arguments only, shall be sworn.
- C. All findings and conclusions necessary to the issuance or denial of the requested appeal or variance (crucial findings) shall be based upon reliable evidence. Competent evidence (evidence admissible in a court of law) shall be preferred whenever reasonably available, but in no case may crucial findings be based solely upon incompetent evidence unless competent evidence is not reasonably available, the evidence in question appears to be particularly reliable, and the matter at issue is not seriously disputed.
- D. The Board of Adjustment may subpoena witnesses and compel the production of evidence. If a person fails or refuses to obey a subpoena issued pursuant to this subsection, the Board of Adjustment may apply to the General Court of Justice for an order requiring that its order be obeyed, and the court shall have jurisdiction to issue these orders after notice to all proper parties. No testimony of any witness before the Board of Adjustment pursuant to a subpoena issued in exercise of the power conferred by NCGS 153A-345 (g) may be used against the witness in the trial of any civil or criminal action other than a prosecution for false swearing committed on the examination. Any person who, while under oath during a proceeding before the Board of Adjustment, willfully swears falsely, is guilty of a Class 1 misdemeanor.

### **13.10 Modification of Application at Hearing**

- A. In response to questions or comments by persons appearing at the hearing or to suggestions or recommendations by the Board of Adjustment, the applicant may agree to modify his application, including the plans and specifications submitted.
- B. Unless such modifications are so substantial or extensive that the Board cannot reasonably be expected to perceive the nature and impact of the proposed changes without revised plans before it, the Board of Adjustment may approve the application with the stipulation that the permit will not be issued until plans reflecting the agreed upon changes are submitted to the Zoning Administrator.

### **13.11 Record**

- A. A record shall be made of all hearings required by [Section 13.06](#), and such record shall be kept as provided by state law. Accurate minutes shall also be kept of all such proceedings, but a transcript need not be made.
- B. Whenever practicable, all documentary evidence presented at a hearing as well as all other types of physical evidence shall be made a part of the record of the proceedings.

#### **13.12 Written Decision**

- A. Any decision made by the Board of Adjustment regarding an appeal or variance shall be reduced to writing and served upon the applicant or appellant and all other persons who make a written request for a copy.
- B. In addition to a statement of the Board of Adjustment's ultimate disposition of the case and any other information deemed appropriate, the written decision shall state the Board's findings and conclusions, as well as supporting reasons or facts.

#### **13.13 Appeals of Board of Adjustment Decisions to Superior Court**

Every final decision of the Board of Adjustment shall be subject to review by the Superior Court of Chowan County by proceedings in the nature of certiorari (See [Section 11.07, Judicial Review](#)).